(3)

Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

No. 00-1520

In The

Supreme Court of the United States

Angela G. McKenzie,

Petitioner,

versus

SETA Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY TO BRIEF IN OPPOSITION

Wendu Mekbib
Counsel of Record
Law Offices of Wendu Mekbib
2540 Flint Hill Road
Vienna, Virginia 22181-5451
(703) 242-7775

Attorney for Petitioner

REPLY TO SETA'S "RESTATEMENT OF QUESTIONS PRESENTED"

The "restatement" is simply question begging and does not have much to do with the exceptionally significant Questions the Petitioner has presented.

TABLE OF CONTENTS

REPLY TO SETA'S "RESTATEMENT OF QUESTIONS PRESENTED" i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY TO SETA'S "JURISDICTIONAL STATEMENT" 1

REPLY TO SETA'S "STATEMENT OF THE CASE" 2

REPLY TO SETA'S "ARGUMENT" 3

I. The Confirmation Order is not the "only final judgment" under the FAA, if at all it is "a final judgment," and is not relevant to the exercise of appellate jurisdiction over McKenzie's appeals..... 3

II. "Silence of the Lamb" - What the Brief in Opposition completely fails to address 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES	Page
American Cas. Of Reading Pennsylvania v. L.J., Inc., 35 F.3d. 133 (4th Cir. 1994)	7
Bates v. United States, 522 U.S. 23 (1997)	5
Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631 (1945)	8
Difford v. Secretary of Health & Human Services, 910 F.2d 1316 (6th Cir. 1990)	5
Digital Equipment Corp. v. Desktop Direct, Inc. 511 U.S. 863, 114 S.Ct. 1992 (1994)	8
Evans v. United States, 504 U.S. 255, 112 S.Ct. 1881 (1992)	8
First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938, 115 S.Ct. 1920 (1995)	3, 7
Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 121 S.Ct. 513 (2000)	3, 7, 8
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944)	9
Hightower v. Texas Hosp. Ass'n., 65 F.3d 443 (5th Cir. 1995)	5

CASES **Page**

Humphrey v. Prudential Securities, Inc.,
4 F.3d 313 (4th Cir. 1993) 8

Imazio Nursery, Inc. v. Dania Greenhouses,
69 F.3rd. 1560 (Fed. Cir. 1995),
cert. denied, 116 S.Ct. 2549, 518 U.S. 1018 5

Kerr v. Puckett, *138 F.3d 321 (7th Cir. 1998)* 5

Russello v. United States, *464 U.S. 16 (1983)* 5

Vesser v. Office of Personnel Management,
29 F.3d 600 (Fed. Cir. 1994) 5

REPLY TO SETA'S "JURISDICTIONAL STATEMENT"

SETA denies this Court's jurisdiction to review the Petition at bar. This is puzzling. The Petition is before this Court pursuant to 28 U.S.C. § 1254(1) *cum* 2101(c). Section 1254 directs:

> "(c)ases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to *any civil ... case,* before or after rendition of judgment or decree."

On the other hand, when and how this is to be done is clearly defined in § 2101(c) which provides in relevant part:

> "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for *within ninety days* after the entry of such judgment or decree."

SETA does not appear to deny that there is a judgment of a three-judge panel of the Fourth Circuit ripe for review by this Court in Petitioner's civil case below. Indeed, said judgment appears as an appendix to its Brief in Opposition. SETA also does not question that the Petition at bar is timely filed. Instead, it argues that, because the Appeals Court chose to deny itself jurisdiction to review Petitioner's appeals, this Court too is without jurisdiction for the same reason. Suffice it to note here that SETA is trapped in the Catch-22 of its illogic. This Court's jurisdiction to grant a writ of certiorari and afford the Petitioner the relief she seeks is beyond question.

REPLY TO SETA'S "STATEMENT OF THE CASE"

Rule 14 of the Rules of the Supreme Court of the United States sets forth the standards defining the content of a writ of certiorari. The Petition before this Court is prepared and submitted with as much attention to the requirements of the Rule as is possible. As required by the Rule, the Statement of the Case has the purpose of concisely "setting out the facts material to consideration of the questions presented."

Having presented the questions for review, as expressed concisely in relation to the circumstances of the case, McKenzie devoted the Statement of the Case to *map out each phase of the proceedings below* to ensure that the questions presented are reviewed within their precise factual context. To avert any claim that any fact has been misstated, McKenzie's Statement is buttressed by crucial direct quotations of both facts and rulings as reflected in the record. There is not a scintilla of statement of fact that would remotely suggest misstatement.[1]

---

[1] At FN 1, p.2, of its Opposition, SETA asserts McKenzie's "mis-statement of facts" because she failed to mention the disposition of her claims in her independently filed and processed civil action *McKenzie v. SETA Corporation & Michael Montavon, P.C., C.A. # 99-381-A (EDVa), filed March 19, 1999.* Matters in said action were not stated considering their separate filing from the claims at bar. However, to the extent that SETA views both as one, McKenzie respectfully notes: [1] Upon filing the 1999 claims, the judge presiding over her underlying action assigned the case to himself and summarily dismissed the claims within 60-days of filing without discovery, without a hearing and in deviation from the controlling law on summary judgment. [2] McKenzie appealed the dismissal (4CCA # 99-1778-I). The Appeals Court granted, but then rescinded oral hearing, summarily affirmed the lower court and dismissed the appeal. For reasons indubitably known to SETA - extreme lack of resources - McKenzie was unable to seek relief before this Court. However, considering SETA's position, it would be a shimmering example of justice if this Court were to use its inherent power to do justice and review both cases!

But here again, the Opposition appears to be trapped in the Catch-22 of its making. SETA restated the questions presented and was exemplary in 'begging the questions.' Guided by this error, its Statement of the Case describes a self-serving calendar of perceived events that do not have much to do with the accurate and chronological proffer of the case provided in the Petition. Indeed, the Opposition's "Statement of the Case" is nothing more than another headline for its twenty-one page argument.

However, SETA is correct in pointing out that Appendix A to the Petition (i.e. the opinion below) omits page two thereof. Due to a printing error, the subject page of the opinion of the Court of Appeals was omitted. McKenzie apologizes for the oversight and endorses as accurate the opinion as reproduced at pages A-1 to A-5 of the Brief in Opposition.

REPLY TO SETA'S "ARGUMENT"

I. The Confirmation Order is not the "only final judgment"under the FAA, if at all it is "a final judgment," and is not relevant to the exercise of appellate jurisdiction over McKenzie's appeals

The Brief in Opposition is a twenty-one page expose of the premise and conclusion of the Appeals Court that the only "final" appealable order in the instant case is the order of the district court confirming the arbitral award. But this is wrong as a matter of the precise language of the statute itself, i.e. the FAA, 9 U.S.C. § 16. It is also in error because it is in direct conflict with the unanimous decision of this Court in *First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938, 115 S.Ct. 1920 (1995)*, and the decision in *Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 121 S.Ct. 513 (2000)*, in addition to those of other Circuits. To wit:

A.

The inquiry begins with the plain language of the statute itself, FAA, 9 U.S.C. § 16 which, in relevant part, provides:

> **"§ 16. Appeals**
> **"(a) An appeal may be taken from –**
> **"(1) an order–**
> **"{...}**
> **"(D) confirming or denying confirmation of an award or partial award, or**
> **"{ ...}**
> **"(3) *a final decision* with respect to an arbitration that is subject to this title."**

The plain language of the statute leaves no doubt that *"order confirming or denying confirmation of an award or partial award,"* albeit appealable by mandates of Congress, *is distinct from and is **not** envisioned to be "a final decision with respect to an arbitration that is subject to [the] title."* Thus, while Congress has intended to list specific orders (including confirmation orders) as appealable, it did not intend for any one of them to be construed as *"a final decision"* perceiving, therefore, orders and decisions beyond the realm of the listed appealable orders, which represent final disposition of matters with respect to arbitration. *If Congress has intended orders "confirming or denying confirmation of an award" to be part of the "final decision(s)" envisioned by § 16(a)(3), it would have fashioned the provision with the additional (inexpensive) word "**other** final decision...."* And if, as SETA and the Court below would have us believe, Congress had intended orders confirming or denying confirmation of arbitral awards to be the *"only"* final orders or decisions appealable, ***it would have eliminated § 16(a)(3)*** and confined itself to the list of appealable orders it enumerated.

The reading of the statute proffered herein is precisely what this Court has long endorsed in interpreting Congressional statutes. Thus, it is held: ***"[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."*** Bates v. United States, *522 U.S. 23, 29 (1997).* And it is a familiar maxim:

> ***"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."*** Russello v. United States, *464 U.S. 16, 23 (1983);* Bates, *op. cit., 29-30.*

Like dicta abound, *vide:*

> "In interpreting a statute, court first examines its language to determine whether Congress has directly spoken to precise question at issue, and *if intent of Congress is clear, that is the end of the matter* because court must give effect to unambiguously expressed intent of Congress." Vesser v. Office of Personnel Management, *29 F.3d 600 (Fed. Cir. 1994).* See also, inter alia, Imazio Nursery, Inc. v. Dania Greenhouses, *69 F. 3rd. 1560 (Fed. Cir. 1995), cert. denied, 116 S.Ct. 2549, 518 U.S. 1018;* Difford v. Secretary of Health & Human Services, *910 F.2d 1316 (6th Cir. 1990);* Kerr v. Puckett, *138 F.3d 321 (7th Cir. 1998);* Hightower v. Texas Hosp. Ass'n., *65 F.3d 443 (5th Cir. 1995).*

Thus, not only that it is wrong to construe the order confirming the arbitration award as a *"final"* order *when the statutory language expresses Congressional exclusion of the term with respect to such orders*, it compounds the error to refer to said order as "the only final appealable order" as the Appeals Court concluded.

B.

A seminal consideration governing review on certiorari is when a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court [Rule 10 of the Rules of the Supreme Court]. Beyond its departure from the statutory law as above enunciated, the opinion below is also in conflict of this Court's decisions on the exceptionally significant issues of appellate jurisdiction.

A core component of McKenzie's appeals involve her claim that she has been deprived her Seventh Amendment jury trial right absent a valid arbitration agreement between her and SETA and upon the premise of the Order of August 22, 1997 compelling arbitration which was secured by fraud and deceit perpetrated upon the district court. *{Please also see Part II, infra}*. In dismissing the appeal, the Appeals Court reasoned that it has no jurisdiction over the appeal because McKenzie did not appeal the order confirming the arbitral award (rendered after the appeal had been lodged) which the Court construed as the only order appealable under the FAA.

Both the reasoning and conclusion of the Court are diametrically opposite of the decision of this Court on the same issue. Not only that the jurisdiction of the Courts of Appeals to review appeals from order directing arbitration is firmly established but so are the standards of review the Appellate Courts must apply. And the exercise of such appellate jurisdiction is vested *"regardless"* of the status of confirmation

orders. Hence, in *First Options of Chicago, Inc. v. Kaplan, 513 U.S. 938, 115 S.Ct. 1920 (1995)* this Court unanimously held:

> "Court of Appeals should accept district court's findings of fact regarding ***agreement to submit issue to arbitration*** if not 'clearly erroneous' but decide questions of law *de novo*, ***regardless of whether district court has confirmed or denied confirmation of arbitration award.***"

The conflict of the opinion below with this Court's decision is apparent. Even more so when one considers *the procedural timing* the Fourth Circuit itself has defined for appeals from orders compelling arbitration, a decision McKenzie relied on [and SETA itself conceded to, please *Petition, page 16]* in lodging her appeal: Such appeals are reviewed ***"after the arbitration has gone forward to final award"*** *American Cas. Of Reading Pennsylvania v. L.J., Inc., 35 F. 3d. 133, 136-137 (4th Cir. 1994).* There can be no dispute that McKenzie's appeals were lodged "after" the arbitration had run its course and final award rendered!

But the conflict does not stop here. By positing its jurisdiction upon appeal lodged from order confirming the arbitration award and declaring same as the sole "final" decision appealable, the Appeals Court has rendered further conflict with yet another important ruling of this Court. For, it has been held that *"**(t)he FAA does permit parties** to arbitration to bring a **separate proceeding** in a district court to enter judgment on an arbitration award once it is made - sic - (or to vacate or modify it) ...."* *Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 85; 121 S.Ct. 513, 520 (2000).*

As propounded in the *Petition, pages 19-25*, the ***"separate" proceedings*** the FAA permits parties to initiate are distinguished between those the party aggrieved by the award

may initiate [under FAA, 9 U.S.C. § 10 *cum* 12] and those that may be initiated by the party favored by the award pursuant to § 9 of the Act. As proffered in the Petition, the "procedures to be followed by the two parties are ***parallel, distinct and separate*** from each other" and the separate proceeding initiated by one party does not foreclose the other to pursue the separate proceeding she is entitled to.

Thus, when McKenzie filed her First and Second motions to vacate the arbitral award and be granted her Seventh Amendment jury trial right, she initiated ***"separate proceeding"*** as permitted by the FAA (and within the tenets of *Green Tree Financial Corp., supra)*. When the district court denied her motions by its Orders of March 29, 1999 and April 30, 1999 (respectively at *Petition, pages A10 and A14*), those orders became "a final decision with respect to an arbitration" appealable within the purview of the FAA, 9 U.S.C. § 16(a)(3). There was nothing else left for the district court to do with respect to those *separate proceedings*; please see, inter alia, *Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867, 114 S.Ct. 1992 (1994), Evans v. United States, 504 U.S. 255, 259-260, 112 S.Ct. 1881 (1992), Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631 (1945).*

Indeed, in a prior decision that McKenzie relied on to lodge her appeal, the Appeals Court itself had sustained by firm dicta the tenor of the arguments herein: ***"We ... review as final judgment any district court action pursuant to 9 U.S.C. § 10."*** *Humphrey v. Prudential Securities, Inc., 4 F.3d 313, 319 (4th Cir. 1993).* By crowning the separate proceeding and confirmation of the arbitral award as the sole genesis for appellate jurisdiction and dismissing McKenzie's claims upon such premise, the Appellate Court has profoundly departed from the controlling decisions of this Court and the statutory scheme of the FAA as intended by Congress.

II. "Silence of the Lamb" - What the Brief in Opposition Completely Fails to Address

As enunciated in her *Petition [pages 28-30]*, McKenzie's seminal claim has been that SETA obtained the August 22, 1997 order compelling arbitration by extrinsic fraud committed upon the district court thereby defeating the legitimate exercise of her Seventh Amendment right to jury trial. What she sought by her First Motion and was denied is the *equitable relief* she is entitled to under Rule 60(b)(3) of the Federal Rules of Civil Procedure for relief from order procured by extrinsic fraud committed upon the court. *The relief she sought is beyond the reach and realm of the FAA. It is a relief that long preceded the very conception of the FAA.* The disgorgement of gain obtained by an act of deceit or fraud committed upon the court and the equitable relief afforded to the victim thereof remains to be a defining gravamen of the blind goodness of justice we all identify with; see *Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944).*

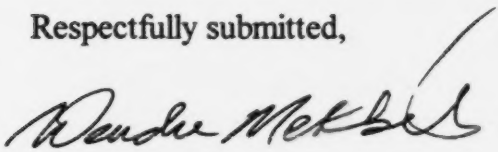
The Brief in Opposition is completely silent on this component of the Petition. Nevertheless, *the jurisdiction of the Appeals Court to review McKenzie's appeal remains plenary pursuant to 28 U.S.C. §§ 1291 cum 1294(1).* There is nothing in existing jurisprudence that would suggest that any content of the FAA has either modified or diminished this plenary jurisdictional authority of the Appeals Court to ensure its primary function - that no one shall garner the fruits of a judgment or order obtained by an act of deceit or fraud perpetrated upon the court. Writ of Certiorari should be granted to remedy the substantial departures from substantive law.

CONCLUSION

It is apparent that SETA has not offered any credible reason that should deter the grant of the Petition for a Writ of Certiorari. The rationale for review and reversal of the opinion below could not be more evident.

WHEREFORE, for the reasons propounded in the Petition, the arguments herein made, and the interest of justice, the Petitioner respectfully requests that her Petition for a Writ of Certiorari be GRANTED for the ultimate purpose of remanding her appeals for review on merits.

Respectfully submitted,



Wendu Mekbib
Counsel of Record for Petitioner
Law Offices of Wendu Mekbib
2540 Flint Hill Road
Vienna, Virginia 22181-5451
Telephone: (703) 242-7775